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# A Personal Jurisdiction Dilemma: Collateral Attacks on Foreign Judgments in U.S. Recognition Proceedings

J. Chad Mitchell\*

## I. INTRODUCTION

Most trial lawyers who practice long enough will likely face the difficult task of deciding whether to defend or to default—that is, deciding whether a client should *defend* a lawsuit on the merits or *default*, and thus permit a default judgment to be entered. If the client is judgment proof (i.e., does not own any assets) then the decision is simple—default. If the client owns assets, however, there are circumstances in which a client would *choose* to allow a default judgment to be entered against it. The defend-or-default question may arise when a foreign court asserts jurisdiction over a U.S. defendant. When the foreign court's jurisdiction is in doubt, the client faces a major decision: defend on the merits in the foreign court, or allow a default judgment to be entered in the foreign jurisdiction and then attack the foreign judgment when the plaintiff attempts to have the judgment recognized and enforced in the United States (where the client presumably owns assets to satisfy the judgment).

But why is the question defend *or* default? Why not defend in the foreign jurisdiction on the merits and then attack the judgment on friendly soil too? These questions lead directly into the teeth of the dilemma: does U.S. law allow a defendant to do both?

Part II of this Article provides a brief overview of U.S. law on defending against recognition and enforcement of foreign judgments,<sup>1</sup>

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1. The terms "recognition" and "enforcement" are different concepts. Recognition of a foreign court's judgment "occurs when a court precludes litigation of a claim or issue because that claim or issue was previously litigated in the court of a foreign nation." Cedric C. Chao & Christine S. Neuhoﬀ, *Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective*, 29 PEPP. L. REV. 147, 147 (2001). "Once a foreign court judgment is recognized, it is entitled to the same preclusive effects as a recognized judgment from a sister-state

with particular emphasis on the defense that the rendering court lacked jurisdiction over the defendant. Part III examines the personal jurisdiction defend-or-default dilemma explained above and discusses relevant U.S. precedent. The final Part argues that a defendant—so long as jurisdiction is timely challenged in the foreign proceedings—should be given the opportunity to defend on the merits in the foreign court without risking a waiver of its right to challenge the foreign court's jurisdiction during U.S. recognition proceedings. The Article concludes by offering some practical tips on navigating the defend-or-default dilemma, so long as it exists.

## II. DEFENDING AGAINST RECOGNITION PROCEEDINGS IN THE UNITED STATES

### *A. U.S. Recognition Proceedings Are Generally Governed by State Law*

Unlike many countries, the United States is not party to any international judgment treaties, so recognition is a matter of comity and decided almost exclusively through state law—even when recognition is sought in a federal court.<sup>2</sup> Treatment of this issue is generally consistent from state to state, with many states adopting the Uniform Foreign Money-Judgments Recognition Act (1962) (Uniform Act)<sup>3</sup> or the recently-revamped version referred to as the Uniform Foreign-Country

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court.” Barb Dawson, Nate Kunz & Andrew Hardenbrook, *Global Impact on Arizona Soil: Recognition and Enforcement of Foreign Judgments in Arizona*, ARIZ. ATT’Y, Feb. 2007, at 24, 24. Enforcement, on the other hand, “occurs when a court, upon request of a prevailing party, requires the losing party to satisfy the judgment. A court in the United States cannot enforce a foreign judgment until it has been recognized.” *Id.* While a court must recognize a judgment in order to enforce it, recognition may also occur independently of enforcement.

2. Linda J. Silberman, *Enforcement and Recognition of Foreign Country Judgments in the United States*, 739 PLI/LIT 351, 354 (2006).

3. Jurisdictions adopting the Uniform Act include Alaska, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, U.S. Virgin Islands, Virginia, and Washington. The National Conference of Commissioners on Uniform State Laws, Legislative Fact Sheet, [http://www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-ufmjra.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufmjra.asp) (last visited Apr. 1, 2008).

Money Judgments Recognition Act (2005).<sup>4</sup> States *not* adopting either of these acts apply common-law principles and Section 482 of the Restatement (Third) of Foreign Relations Law (1987) (Restatement),<sup>5</sup> which is very similar to the Uniform Act.<sup>6</sup> Hence, even if the Uniform Act does not apply, courts still follow the same basic approach to recognition and enforcement.<sup>7</sup>

*B. Bases for Defending Against Recognition Under the Uniform Act*

Under the Uniform Act, foreign judgments are presumptively recognizable unless one of the defenses is satisfied. The Uniform Act and Restatement Section 482 include a number of largely identical defenses to the recognition of foreign judgments. Some of the defenses are mandatory—meaning the judgment cannot be recognized if the elements of the defense are met; other defenses are within the court’s discretion. For purposes of brevity, the following tables summarize the mandatory and discretionary defenses available under the Uniform Act, including one notable difference from the Restatement.

Table 1

<b>Mandatory Defenses Under Uniform Act</b>	<b>Section</b>
Judgment must be “final and conclusive and enforceable where rendered.”	§ 2
Judgment rendered under system of laws that does not provide impartial tribunals or procedural due process of law.	§ 4(a)
Foreign court did not have personal jurisdiction over	§ 4(a)

4. California, Idaho, and Nevada have adopted this version. The National Conference of Commissioners on Uniform State Laws, Legislative Fact Sheet, [http://www.nccusl.org/update/uniformact\\_factsheets/uniformacts-fs-ufcmjra.asp](http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-ufcmjra.asp) (last visited Apr. 1, 2008).

5. Jurisdictions not adopting the Uniform Act include Alabama, Arizona, Arkansas, Colorado, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Nebraska, New Hampshire, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

6. Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1168 (2006).

7. Silberman, *supra* note 2, at 354.

the defendant.	
Foreign court did not have subject-matter jurisdiction. (This is a discretionary defense under Restatement Section 482).	§ 4(a)

Table 2

<b>Discretionary Defenses Under Uniform Act</b>	<b>Section</b>
Defendant did not receive timely notice of proceedings to sufficiently defend.	§ 4(b)
Judgment obtained by fraud.	§ 4(b)
The cause of action on which the judgment is based is repugnant to the public policy of the state.	§ 4(b)
Judgment conflicts with another final and conclusive judgment.	§ 4(b)
Proceeding in foreign court was contrary to agreement between the parties under which the dispute in question was to be settled.	§ 4(b)
In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum.	§ 4(b)

### *C. Defending on Personal Jurisdiction Grounds*

The Due Process Clause requires U.S. courts to conduct their own personal jurisdiction analysis and, before recognizing foreign judgments, find that U.S. personal jurisdiction standards were met in the foreign lawsuit. For example, one commentator has stated the following:

The prevailing view is that, even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of American concepts of jurisdiction to

adjudicate. *International Shoe* and its progeny govern the determination here.<sup>8</sup>

Thus, it is no surprise that the foreign-court-lacked-jurisdiction-over-the-defendant defense is the most common defense to recognition of foreign judgments in the United States.<sup>9</sup>

*1. Potential waiver of personal jurisdiction defense under the Uniform Act*

Section 4(a) of the Uniform Act provides that a U.S. court shall not recognize a foreign judgment if the foreign court did not have personal jurisdiction over the defendant.<sup>10</sup> Section 5(a), however, provides a list of conditions, which, if any one is met, defeats the defense of lack of personal jurisdiction. For example, the personal jurisdiction defense to recognition fails if:

- (1) the defendant was served personally in the foreign state;
- (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
- (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;

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8. Ronald A. Brand, *Enforcement of Foreign Money-Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 NOTRE DAME L. REV. 253, 272 (1991); see also, e.g., *Wimmer Canada, Inc. v. Abco Tractor & Equip. Co.*, 750 N.Y.S.2d 331, 332 (App. Div. 2002) (applying general rule that New York courts may recognize foreign judgments if foreign court had personal jurisdiction under "any jurisdictional basis [New York] recognizes in its internal law"); *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905 (N.D. Iowa 2002) (refusing to enforce Australian judgment where record was insufficiently developed to determine whether jurisdiction of Australian court met U.S. due process standards).

9. See Linda Silberman, 3 LAWS OF INT'L TRADE § 97:3.

10. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4(a) (1962) [hereinafter UNIFORM ACT].

(4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;

(5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or

(6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.<sup>11</sup>

The Uniform Act also provides that a U.S. court may reject the lack-of-personal-jurisdiction defense if the foreign court appropriately exercised jurisdiction over the defendant in accordance with the U.S. state's long-arm statute.<sup>12</sup> Therefore, even if none of the section 5(a) elements is met, the lack of personal jurisdiction defense may still be defeated under state long-arm statute analysis.

*a. Personal jurisdiction under state long-arm statutes.* Under some state long-arm statutes, such as Delaware's and New York's, jurisdiction is proper only if certain enumerated acts are met.<sup>13</sup> In these enumerated-acts states, the defendant's alleged conduct giving rise to the plaintiff's claims must fall within the scope of the relevant long-arm statute.<sup>14</sup> If a court finds that personal jurisdiction is legitimate under the relevant long-arm statute, the court must decide whether exercising personal jurisdiction would violate the Fourteenth Amendment's Due Process Clause. If an enumerated act is met and exercising jurisdiction

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11. *Id.* § 5(a).

12. *See id.* § 5(b).

13. *E.g.*, DEL. CODE ANN. tit. 10, § 3104 (1995) (Delaware long-arm statute); N.Y. C.P.L.R. 302 (McKinney 2006) (New York long-arm statute).

14. *See, e.g.*, *Outokumpu Eng'g Enters. v. Kvaerner EnviroPower, Inc.*, 685 A.2d 724, 728 (Del. Super. Ct. 1996) (where sole jurisdictional act was incorporating subsidiary, plaintiff's action must relate to corporate existence or Delaware corporate law for there to be specific jurisdiction).

would not violate the Due Process Clause, then jurisdiction under the long-arm statute is proper and a defendant's lack-of-personal-jurisdiction defense fails.

Other states, like California and Nevada, authorize long-arm jurisdiction to the maximum extent permitted by the Due Process Clause.<sup>15</sup> In these states, the personal jurisdiction analysis essentially collapses into one question—would exercising personal jurisdiction over the defendant offend due process?<sup>16</sup> Though the path used in each state's analysis may vary slightly, each state must ultimately ensure that the foreign court's assertion of personal jurisdiction at least comports with the standards set forth in *International Shoe Co. v. Washington*<sup>17</sup> and its progeny. The heart of the *International Shoe* standard is that the defendant must have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>18</sup>

More specifically, under *International Shoe* the due process standard requires "minimum contacts" between the absent defendant and the forum so that the defendant would reasonably anticipate being haled into court there.<sup>19</sup> When applying *International Shoe*'s "minimum contacts" test to determine whether a court asserting specific jurisdiction over a non-resident defendant violates due process, a court will consider the following basic factors: whether the defendant purposefully directed activities at the forum state's residents or purposefully availed itself of

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15. See, e.g., CAL. CIV. PROC. CODE § 410.10 (West 2004) ("A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."); *Lemelson v. Van Dorn Plastics Mach.*, No. CV-N-91-351-HDM, 1992 WL 474173, \*1-2 (D. Nev. Oct. 30, 1992) (Nevada's long-arm statute reaches "any activity not proscribed by the Due Process Clause").

16. *Luc v. Krause Werk GMBH & Co.*, 289 F. Supp. 2d 1282, 1287 (D. Kan. 2003) (Kansas long-arm statute reaches to the fullest extent permitted by due process; where statute reaches fullest extent permitted by due process, court proceeds directly to due-process analysis).

17. 326 U.S. 310 (1945).

18. *Id.* at 316 (citations omitted).

19. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); see also, *Int'l Shoe*, 326 U.S. at 316.



the forum's laws and protections;<sup>20</sup> whether there is a "substantial connection" between the jurisdictional acts of the defendant and the plaintiff's claim;<sup>21</sup> whether personal jurisdiction over the defendant would offend "traditional notions of fair play and substantial justice";<sup>22</sup> and whether it is reasonable to exercise jurisdiction.<sup>23</sup> Under this last reasonableness factor, the court weighs the burden on defendant, the forum state's interests, the plaintiff's interests, the efficient resolution of disputes, and the shared interest of states.<sup>24</sup>

As a result, unless the U.S. court finds that the foreign court's assertion of personal jurisdiction minimally comports with the standards set forth in the state's long-arm statute, recognition of the foreign judgment in the United States is unlikely. If the foreign court's assertion of jurisdiction comports with the standard of the state's long-arm statute, the defendant's lack-of-jurisdiction defense to enforcement will fail.

*b. U.S. court's factual analysis likely limited to facts before foreign court.* While U.S. courts should apply U.S. personal jurisdiction principles in a recognition proceeding, the factual analysis is likely limited to the facts before the foreign court.<sup>25</sup> The most frequently cited case for this proposition is *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*<sup>26</sup> In *Somportex*, the Third Circuit held, under Pennsylvania law, that by appearing and defending the lawsuit in England, the U.S. defendant's attempt to re-litigate the English court's factual determinations regarding jurisdiction was barred by *res judicata*.<sup>27</sup> While the court applied *International Shoe*'s due process test, it refused

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20. *Burger King v. Rudzewicz*, 471 U.S. 462, 472 (1985); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 109 (1987).

21. *Burger King*, 471 U.S. at 475.

22. *Asahi*, 480 U.S. at 113.

23. *Burger King*, 471 U.S. at 476-77.

24. *Id.*

25. See *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 743 N.Y.S.2d 408, 421 (App. Div. 2002) (limiting analysis of whether foreign court had personal jurisdiction to facts set forth by rendering court).

26. 453 F.2d 435 (3d Cir. 1971), *cert. denied* 405 U.S. 1017 (1972).

27. *Id.* at 441.

to disturb the English court's factual findings regarding personal jurisdiction.<sup>28</sup> On the other hand, if jurisdictional facts have not been litigated in the foreign court (e.g., a default judgment), the court asked to recognize the judgment will likely reexamine any relevant factual findings.<sup>29</sup>

With these basic principles in mind, we explore a defendant's dilemma when faced with the decision of whether to defend on the merits in the foreign court.

### III. THE PERSONAL JURISDICTION DILEMMA

In U.S. recognition actions, unsuccessful defendants in foreign court proceedings frequently raise the defense that the foreign court lacked personal jurisdiction. But, if the defendant appeared in the foreign court and defended the suit on the merits, U.S. courts generally find the personal jurisdiction defense waived.

#### *A. Waiver of Personal Jurisdiction Defense in U.S. Recognition Proceedings if Party Defends Suit on Merits in Foreign Court*

The leading waiver cases come from New York. In *CIBC Mellon Trust Co. v. Mora Hotel Corp.*,<sup>30</sup> plaintiffs sought recognition of an English High Court of Justice, Chancery Division, judgment against two corporations doing business in New York. The court's analysis was based on New York's version of the Uniform Act, adopted in 1970 as Civil Practice Law and Rules (CPLR) article 53.<sup>31</sup> The court grounded its ruling on CPLR article 5305(a)(2), which states that recognition cannot be refused on personal jurisdiction grounds where "the defendant voluntarily appeared in the proceedings, other than to protect property seized or threatened to be seized or of contesting the jurisdiction of the

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28. *Id.* at 443–44.

29. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481, Reporter's Notes 3 (1987).

30. 792 N.E.2d 155 (N.Y. 2003).

31. *Id.* at 221; see also N.Y. Civil Practice Law and Rules art. 53 (McKinney 1970) [hereinafter CPLR].

court over him.”<sup>32</sup> The court focused on the fact that the defendants had, after a default judgment was entered against them, appeared before the English court to argue that the default judgments should be vacated.<sup>33</sup>

The court noted that significant time was spent by the defendants arguing the merits of the case, and the defendants’ appearance was without preservation of objections to the High Court’s jurisdiction over them.<sup>34</sup> The court relied on the commentary to CPLR 5305(a)(2), explaining that “[i]f the judgment debtor did any more than she had to do . . . to preserve her jurisdictional objection in the foreign court, she would thereby have submitted voluntarily to its jurisdiction and forfeited the right to claim an exception for herself under this paragraph.”<sup>35</sup> Finding that the defendants had done exactly this, the New York court held that the defendants waived their right to contest the English court’s jurisdiction by arguing the merits in England.

In reaching its holding, the court also relied on *Nippon Emo-Trans Co. v. Emo-Trans, Inc.*<sup>36</sup> The Federal District Court in *Nippon Emo-Trans* provided an exhaustive and thorough opinion, in which it held that anything beyond a challenge to jurisdiction in the foreign court would effectuate a waiver of any argument of lack of personal jurisdiction in the enforcing court under CPLR 5305(a)(2).<sup>37</sup> Recognizing the potential unfairness of the holding, the court offered the following rationale:

If a defendant genuinely has no significant contacts with a particular forum, then it can challenge jurisdiction there, and if unsuccessful at that stage, *safely default on the merits*; presumably, the judgment will be meaningless in the foreign country, since the defendant will have no assets there, and such a judgment will not be enforced in New York. On the other hand, if the defendant’s relationship with the foreign country is such that a default in the foreign country would seriously affect its

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32. *CIBC Mellon Trust Co.*, 792 N.E.2d at 223; *see also* UNIFORM ACT, § 5(a)(2); CPLR art. 5305.

33. *CIBC Mellon Trust Co.*, 792 N.E.2d at 225.

34. *Id.*

35. *Id.* at 223 (citing Siegel, Practice Commentaries, McKinney’s Cons. Laws of NY, Book 7B, CPLR C5305:1, at 556).

36. 744 F. Supp. 1215 (E.D.N.Y. 1990).

37. *Id.* at 1220.

assets or business relationships, then it is probable that a New York court would find that the foreign court properly took jurisdiction; in either case, the defendant, knowing all the facts, is in the best position to determine whether its contacts with the foreign country are sufficient to support jurisdiction and warrant a defense on the merits.<sup>38</sup>

These decisions seem to leave little room for argument. Asserting defenses in a foreign court, other than jurisdictional challenges, results in waiver of the personal jurisdiction defense in U.S. recognition proceedings. Thus, defendants are left with a choice between solely challenging jurisdiction or submitting to the foreign court's jurisdiction and proceeding with a defense on the merits.

*B. No Waiver of Personal Jurisdiction Defense in U.S. Recognition Proceeding Even If Party Defends Suit on Merits in Foreign Court*

Only one U.S. case was found where a party defended the suit on the merits in the foreign court, lost, and was subsequently allowed to challenge personal jurisdiction in a recognition action in a U.S. court. In *Hunt v. BP Exploration Co. (Libya)*,<sup>39</sup> Hunt challenged personal jurisdiction, defended on the merits an English lawsuit against him and, during the recognition action in Texas, the court held that he had not waived his right to argue that the English court lacked personal jurisdiction (though the court ultimately rejected the defense). The court reasoned as follows:

Hunt appeared in the English action and litigated the merits after losing his jurisdictional challenge. Hunt even litigated his counterclaims. But trying the merits of the British suit after losing the jurisdictional argument is not a consent to the jurisdiction of the English court and a waiver of his due process rights to the appropriate forum. . . . [I]n federal court it is well established that a party who loses a timely challenge to the jurisdiction of the trial court can proceed to litigate on the merits, can attack that judgment on appeal both on the merits and

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38. *Id.* at 1225 (emphasis added) (holding that "any presentation on the merits would warrant the conclusion that a defendant had appeared generally, and that this would preclude the defendant from mounting a subsequent collateral attack on jurisdictional grounds").

39. 492 F. Supp. 885 (N.D. Tex. 1980).

on jurisdictional grounds. . . . Litigating on the merits after loss on a jurisdictional challenge is thus not considered to be consent to jurisdiction.<sup>40</sup>

The *Hunt* court is not the only jurisdiction that has not followed the Uniform Act's approach to the question of whether a defendant can litigate the merits of a lawsuit in a foreign court and challenge personal jurisdiction in enforcement proceedings in the United States.

There is another line of cases suggesting—but, unlike *Hunt*, not holding—that so long as the defendant consistently challenges personal jurisdiction, then the defendant can proceed to defend the case on the merits in the foreign court and still assert the defense of lack of personal jurisdiction in the recognition proceeding. In *South Carolina National Bank v. Westpac Banking Corp.*, the court held that the defendant waived its right to defend on personal jurisdiction grounds because the defendant could have, but did not (1) file an interlocutory appeal challenging the foreign court's ruling regarding personal jurisdiction, (2) reassert personal jurisdiction objections at trial, and (3) assert personal jurisdiction challenges on appeal.<sup>41</sup>

*Hunt* and *Westpac Banking Corp.* were not governed by the Uniform Act. *Hunt* did not follow the Uniform Act because Texas did not adopt the act until 1981.<sup>42</sup> *Westpac Banking Corp.* did not follow the act either as South Carolina has never adopted it. *Dart v. Balaam*, a case that did apply the Uniform Act, came up with essentially the same result as *Hunt* and *Westpac Banking Corp.*,<sup>43</sup> but instead of specifically referencing section 5(a)(2), *Dart* relied upon *Westpac Banking Corp.*

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40. *Id.* at 895.

41. 678 F. Supp. 596, 599–600 (D.S.C. 1987) (distinguishing *Hunt* from case before it because “Hunt made it clear he did not submit to the English court’s jurisdiction or acquiesce to its judgment”).

42. See TEX. CIV. PRAC. & REM. CODE ANN. § 36 (1981).

43. *Dart v. Balaam*, 953 S.W.2d 478, 481 (Tex. Ct. App. 1997) (“[W]here a defendant appears before a court or files a responsive pleading without asserting a jurisdictional defense, personal jurisdiction in that court is established by the defendant’s consent, and the defendant’s objections to personal jurisdiction are waived.”).

IV. NO VOLUNTARY WAIVER OF CONSTITUTIONAL RIGHTS IN U.S.  
RECOGNITION PROCEEDINGS WHERE DEFENDANT OBJECTS TO FOREIGN  
COURT'S JURISDICTION DURING FOREIGN PROCEEDING

The defend-or-default dilemma is not a theoretical issue. On the contrary, it can be a painful decision for a U.S. entity that finds itself a foreign defendant. Consider the following scenario: A U.S. defendant is sued in a foreign country with a low threshold for exercising jurisdiction over defendants in tort claims where the injury is suffered within its borders. The U.S. defendant has some solid substantive defenses that would, if successful, be a complete defense to the lawsuit. Additionally, the defendant has had some contacts with the foreign jurisdiction, but it is not clear whether a U.S. court would find these contacts sufficient to satisfy U.S. personal jurisdiction standards. Under the New York rule, if this defendant asserts its substantive defenses in the foreign court, then it will be deemed to have waived its right to challenge the foreign court's assertion of personal jurisdiction during U.S. recognition proceedings—even if fundamental due process standards have not been met.<sup>44</sup> If the defendant wants to preserve its due process rights with regards to jurisdiction, then it must forfeit its opportunity to defend the suit on the merits in the foreign court and allow a default judgment to be entered against it.<sup>45</sup>

Consider another scenario: A defendant that is sued in a foreign jurisdiction has assets in the United States and other countries. U.S. due process standards for jurisdiction are clearly not met in the foreign court. The defendant cannot “safely default on the merits,” however, since the plaintiff may choose to enforce the judgment in a country other than the United States (where U.S. due process standards would not apply). Unable to safely default, the defendant chooses to defend on the merits in the foreign court. Under New York's rule, if the plaintiff wins and pursues recognition proceedings in the United States, the defendant

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44. See *CIBC Mellon Trust Co. v. Mora Hotel Corp.*, 792 N.E.2d 155 (N.Y. 2003).

45. *Id.*

would be considered to have waived its due process rights by appearing in the foreign court to defend the lawsuit on the merits.<sup>46</sup>

Neither of these scenarios seems like “fair play,” as that term is used in *International Shoe*. The following section addresses problems with the New York approach, as well as a proposed standard that attempts to strike a fair balance.

*A. New York Courts Have Set the Standard Too Low to Adequately Protect Constitutional Due Process Rights*

U.S. law generally requires a significant degree of proof to find a waiver of due process rights. In *D.H. Overmyer Co. v. Frick Co.*,<sup>47</sup> the U.S. Supreme Court said waivers of constitutional rights in the civil context must be “voluntary, knowing, and intelligently made,” or “an intentional relinquishment or abandonment of a known right” to which there could be no presumption.

In the context of foreign personal jurisdiction, however, New York courts have set a lower standard for waiver. First, it cannot be said that every defendant who appears in a foreign courtroom and defends on the merits has “voluntar[ily], know[ing], and intelligently” agreed to waive its right to have a U.S. court determine under U.S. due process principles whether personal jurisdiction in the foreign venue is appropriate.<sup>48</sup> In fact, generally in U.S. practice, a defendant may challenge personal jurisdiction and (if necessary) proceed to defend on the merits without waiving the right to have personal jurisdiction objections heard on appeal.<sup>49</sup> Second, while a defendant’s “voluntary” appearance in the

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46. *Id.*

47. 405 U.S. 174, 185–86 (1972).

48. *See id.* (“Defendants did not preserve any objection to the High Court’s jurisdiction over them for purposes of this recognition proceeding. Indeed, they went so far at oral argument as to suggest that if they had successfully vacated the English judgments and unsuccessfully defended on the merits, they still could have contested personal jurisdiction in a future New York recognition proceeding.”).

49. *E.g.*, *N. Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 23 (1st Cir. 2005) (holding that the defendant, who moved to dismiss complaint on personal jurisdiction grounds, lost at the trial court level, and then proceeded to defend case on the merits, had not waived right to renew personal jurisdiction objection on appeal) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal*

foreign court may technically satisfy the language from the Uniform Act, that hair-trigger standard does not appear to comport with more recent Supreme Court precedent regarding waiver of constitutional rights or due process rights associated with personal jurisdiction. For instance, the *Hunt* court said, “[b]ut trying the merits of the British suit after losing the jurisdictional argument *is not a consent to the jurisdiction of the English court and a waiver of his due process rights to the appropriate forum.*”<sup>50</sup>

Finally, the waiver of constitutional protections is not applied to other defenses to recognition. For example, another basis to challenge a foreign judgment is that the foreign judgment was rendered under a system of laws that does not provide impartial tribunals or procedural due process of law.<sup>51</sup> But defending on the merits in the foreign country is not a waiver to later challenging that same system on procedural due process grounds in the United States.<sup>52</sup> Apparently, a defendant can defend on the merits in the foreign jurisdiction and, if not successful, still maintain the right to argue that the judgment was rendered under a system of laws that did not comport with fundamental notions of due process. Jurisdictional due process rights should not be afforded any less protection.

*B. The Outcome of a U.S. Due Process Analysis Can Be Difficult (and Risky) to Predict*

The *Nippon-Emo* opinion reasoned that because the defendant knows what contacts it has had with the forum, it is in the best position to determine “whether its contacts with the foreign country are sufficient to

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Practice & Procedure § 1351 (3d ed. 2004)); *In re Appeal in Maricopa County, Juvenile Action No. JS-734*, 543 P.2d 454, 460 (Ariz. Ct. App. 1976); *see also* *Hunt v. BP Exploration Co. (Libya) LTD.*, 492 F. Supp. 885, 895 (N.D. Tex. 1980) (“[I]n federal court it is well established that a party who loses a timely challenge to the jurisdiction of the trial court can proceed to litigate on the merits, can attack that judgment on appeal both on the merits and on jurisdictional grounds.”).

50. *Hunt*, 492 F. Supp. at 895 (emphasis added).

51. UNIFORM ACT § 4(a).

52. *See, e.g., S.C. Chimexim S.A. v. Velco Enters. Ltd.*, 36 F. Supp. 2d 206, 215 (S.D.N.Y. 1999) (hearing and rejecting argument that Romania’s legal system did not comport with due process standards even after suit defended on the merits).



support jurisdiction and warrant a defense on the merits.”<sup>53</sup> If the determination is that there is no personal jurisdiction, then the defendant can “safely default on the merits.”<sup>54</sup> But, as most first-year law students, practitioners and even some professors may attest, whether an entity has “sufficient contacts” for jurisdictional purposes is not an easy question to answer.<sup>55</sup> Due to the fact-intensive and somewhat subjective nature of the due process analysis, counsel is not likely to be in a position to advise a client that it may “safely default on the merits” because a U.S. court would hold that the foreign court lacks personal jurisdiction.<sup>56</sup>

If a defendant could know beforehand how a U.S. court would rule on the personal jurisdiction question, this certainty would destroy the defend-or-default dilemma, at least in the scenario in which the defendant only owns assets in the United States. Unfortunately, U.S. courts have consistently held that cases seeking a declaration that a foreign judgment is not enforceable in the United States—before any foreign judgment has even been entered—are too hypothetical for domestic courts to assert jurisdiction. For instance, in *Dole Food Co. v. Gutierrez*,<sup>57</sup> a California court stated, “Dole asks this court to declare unenforceable judgments not yet rendered or sought to be enforced in the United States. Under such circumstances, the court finds no ‘actual controversy’ exists, as required by the Constitution.”<sup>58</sup> In *Dow Jones & Co. v. Harrods, Ltd.*,<sup>59</sup> a New York court held that the prospects that an adverse judgment might be entered and enforcement sought in the United

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53. 744 F. Supp. at 1225.

54. *Id.*

55. See, e.g., *Hidalgo v. Chrome Crankshaft Co.*, No. B146957, 2002 WL 1797271 (Cal. Ct. App. Aug. 6, 2002) (reversing trial court’s decision that the court lacked personal jurisdiction to hold, based on the same contacts, that such contacts were sufficient to satisfy personal jurisdiction standards).

56. *Nippon-Emo*, 744 F. Supp. at 1225.

57. No. CV 039416 NM (PJWX), 2004 WL 3737123 (C.D. Cal. July 13, 2004).

58. *Id.* at \*15.

59. 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff’d*, 346 F.3d 357 (2d Cir. 2003).

States were “too abstract, remote, and hypothetical” to “constitute an actual controversy qualifying for” declaratory relief.<sup>60</sup>

With little opportunity for advanced guidance and the significant risk of allowing a default judgment to be entered, thus forgoing a defense on the merits, the chances that counsel will advise a client to default are slim. If the defendant has a legitimate defense on the merits, however, the most likely scenario is that the defendant will challenge jurisdiction and, if necessary, proceed to defend the case on the merits.

*C. There Should Not Be a Waiver of Constitutional Rights Where a Defendant Challenges the Foreign Court's Assertion of Jurisdiction*

New York's interpretation of the Uniform Act achieves an unwelcome result.<sup>61</sup> A more effective rule is laid out in the Restatement, which reads, “A defense of lack of jurisdiction is generally waived by any appearance by or on behalf of a person or thing . . . if the appearance is for a purpose *that does not include a challenge to the exercise of jurisdiction.*”<sup>62</sup> The comments elaborate on this point: “In most legal systems, appearance in a proceeding . . . is deemed to waive the defense of lack of jurisdiction, unless the appearance has as its purpose (or one of its purposes) a challenge to the court's jurisdiction.”<sup>63</sup> The

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60. *Id.* at 407–09; *see also* *Basic v. Fitzroy Eng'g, Ltd.*, 949 F. Supp. 1333, 1337–38 (N.D. Ill. 1996) (“The Constitution does not allow a federal district court to issue advisory opinions based on fears of future judgments and speculation.”), *aff'd*, 132 F.3d 36 (7th Cir. 1997).

61. On this issue, there does not appear to be any difference between the 1962 Uniform Act and the Uniform Foreign-Country Money Judgments Recognition Act of 2005, as the relevant language used in § 5(a)(2) in each version is nearly identical. Compare the 1962 Uniform Act § 5(a)(2) (“The foreign judgment shall not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him.”) with its 2005 counterpart (“A foreign-country judgment may not be refused recognition for lack of personal jurisdiction if . . . the defendant voluntarily appeared in the proceeding, other than for the purpose of protecting property seized or threatened with seizure in the proceeding or of contesting the jurisdiction of the court over the defendant.”).

62. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421(3) (1987) (emphasis added).

63. *Id.* at cmt. g.

Restatement's approach achieves a fairer balance than New York's interpretation of the Uniform Act.

First, under the Restatement, a waiver of the right to challenge the foreign court's assertion of jurisdiction can still occur if the defendant does not challenge the foreign court's jurisdiction or fails to make the challenge in a timely manner. While it may come as a surprise that defending on the merits in a foreign court waives a defendant's right to challenge personal jurisdiction in the United States,<sup>64</sup> very few (if any) U.S. litigators should be surprised to learn that appearing with no challenge at all to a court's assertion of jurisdiction constitutes a waiver.<sup>65</sup> Thus, the Restatement's approach better comports with the "voluntary, knowing, and intelligently made" standard for waiver of constitutional rights.

Second, the Restatement's approach minimizes the risk and uncertainty associated with predicting the outcome of the U.S. personal jurisdiction due process analysis. For example, when a defendant challenges the foreign court's assertion of jurisdiction and loses, it may be unclear whether the foreign court's assertion of jurisdiction comports with U.S. due process principles. Rather than imperil itself, the defendant may, under the Restatement approach, defend the case on the merits in the foreign jurisdiction while still preserving the opportunity for U.S. due process principles to be applied to the foreign court's assertion of jurisdiction in any U.S. recognition proceedings.

Third, there does not appear to be any legitimate basis for U.S. courts to treat waiver of the personal jurisdiction defense differently in the foreign-judgment context than in U.S. courts. As a matter of fairness and consistency, the Restatement approach is not simply reserved for foreign defendants seeking to have a foreign judgment recognized and enforced in the United States. The same waiver rule used in the Restatement is generally applied in U.S. litigation.<sup>66</sup> Additionally, the United States recognizes and enforces foreign judgments "much more readily" than

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64. See, e.g., *N. Laminate Sales, Inc. v. Davis*, 403 F.3d 14, 23 (1st Cir. 2005).

65. E.g., *Connor v. Statewide Grievance Comm.*, 797 A.2d 1081, 1087 (Conn. 2002) ("It is fundamental that jurisdiction over a person can be obtained by waiver.").

66. See, e.g., *N. Laminate Sales, Inc.*, 403 F.3d at 23.

U.S. judgments are enforced abroad.<sup>67</sup> From a policy standpoint, adopting the Restatement's approach is a step toward leveling the playing field by allowing U.S. defendants abroad the ability to challenge a foreign court's assertion of personal jurisdiction under U.S. due process principles without being forced to forgo what may be the only opportunity to defend the claim on the merits.

For these reasons, states should expressly adopt the Restatement's approach to challenging a foreign court's assertion of personal jurisdiction in U.S. recognition proceedings.

#### V. CONCLUSION

Unfortunately, the personal jurisdiction dilemma exists under the New York rule. Thus, if a defense on the merits is presented in the foreign jurisdiction, the defendant will likely be found to have waived its right to challenge the foreign court's assertion of personal jurisdiction in New York recognition proceedings, regardless of the steps taken to preserve its right to defend on personal jurisdiction grounds in any recognition proceedings.

Outside of New York, there is a possibility that the defendant can both defend in the foreign court on the merits and challenge personal jurisdiction in a U.S. recognition action. If a defendant has viable substantive defenses in the foreign court, but it is uncertain whether the foreign court has personal jurisdiction (such that a foreign judgment may be enforceable in the United States), it may be advisable to defend the suit on the merits in the foreign court while making every effort to preserve the objection to personal jurisdiction. The following guideposts will likely improve a client's chances of being found by a U.S. court to have preserved its ability to challenge the foreign court's assertion of personal jurisdiction: (1) make a special appearance to specifically challenge the foreign court's assertion of personal jurisdiction; (2) seek dismissal of the lawsuit on the basis that the court lacks personal jurisdiction; (3) seek an interlocutory appeal if one loses on the personal

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67. Louise Ellen Teitz, *The Hague Choice of Court Convention: Validating Party Autonomy and Providing An Alternative to Arbitration*, 53 AM. J. COMP. L. 543, 548 (2005).

jurisdiction issue; (4) continue personal jurisdiction objections during trial and on appeal; and (5) refrain from seeking affirmative relief (e.g., counterclaims or cross-claims), as some courts may find this a waiver of the personal jurisdiction defense.<sup>68</sup>

Even if some of these arguments are not recognized by the foreign court, or might be rejected out of hand, arguing for and adhering to these guideposts improves the chance that a U.S. court will analyze the foreign court's assertion of personal jurisdiction under U.S. due process principles, regardless of whether it applies the Uniform Act or the Restatement.

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68. *E.g.*, *PaineWebber Inc. v. Chase Manhattan Private Bank*, 260 F.3d 453, 461 (5th Cir. 2001).